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German Reparations to the Herero Nation: An Assertion of Herero Nationhood in the Path of Namibian Development

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GERMAN REPARATIONS TO THE HERERO NATION: AN ASSERTION OF HERERO NATIONHOOD IN THE PATH OF NAMIBIAN DEVELOPMENT?

*Sidney L. Harring**

I.	A CLAIM FOR REPARATIONS	393
II.	THE HERERO WAR: A COLONIAL WAR OF GENOCIDE.....	397
III.	THE LEGAL BASIS OF THE CLAIM FOR HERERO REPARATIONS	402
IV.	THE POLITICS OF HERERO REPARATIONS IN NAMIBIA.....	410
V.	CONCLUSION	414

I. A CLAIM FOR REPARATIONS

German Chancellor Helmut Kohl probably expected a pleasant and uneventful visit to Namibia in September of 1995. Formerly the German colony of South West Africa, the new nation of Namibia is visibly proud of its German heritage, evident everywhere in its capital at Windhoek, in stoutly built brick and stone colonial buildings.¹ Germany, in turn, is Namibia's largest provider of foreign aid and equally proud of its role in Namibian development.² However,

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¹ In fact, the Namibian parliament and government currently meet in buildings built during the German occupation of the territory and colonial era. See *Namibian Tribe Protests Against German Massacre*, REUTERS NEWS SERVICE, Sept. 15, 1995, available at <http://listserv.acsu.buffalo.edu/cgi-bin/wa?A2=ind9509&L=anthro-l&F=&S=&P=39405> (last visited Oct. 12, 2001) (copy on file with the *West Virginia Law Review*).

² See *Hereros Seek Compensation on Same Basis As Nazi Slaves*, SOUTHSCAN, Sept. 9, 2000, at <http://allafrica.com/stories/200009090019.html> (last visited Oct. 12, 2001) (copy on

while Kohl was visiting a German community in Namibia, around three-hundred "members of the Herero tribe led by Paramount Chief Kuaima Riruako marched on the German embassy in Windhoek and handed in a petition for Kohl."³ As it turns out, the Herero wanted to meet Kohl during his visit to Namibia. However, Kohl refused and instead visited the coastal town of Swakopmund.⁴ The petition was a demand for reparations resulting from the near extermination of the Herero by the Germans during the Herero War of 1904-07.⁵ The war, although not well known in a world of far more deadly wars, was among the twentieth century's bloodiest colonial wars, killing at least sixty-thousand of the eighty-thousand Herero and resulting in the German seizure of all Herero lands and cattle.⁶ As a result, Central Namibia was swept clean of black occupation, setting the stage for the creation of the European agricultural economy that prevails today.⁷

Herero Paramount Chief Kuaimi Riruako demanded reparations of \$600 million (US).⁸ After delivering the petition, Riruako stated, "We think we have a legitimate claim for reparations as a result of the war and genocide committed against the Hereros by the German army."⁹ The Herero Traditional Authority, he

file with the *West Virginia Law Review*).

³ See *Namibian Tribe Protests Against German Massacre*, *supra* note 1. Among those who presented the petition was an "army" of "truppenspieler," wearing carefully mended colonial German uniforms. The truppenspieler, literally "troop players" appear everywhere at Herero occasions. See Wolfgang Werner, *Playing Soldiers: The Truppenspieler Movement Among the Herero of Namibia, 1915-1945*, 16 J. S. AFR. STUD. 476, 485-502 (1990). The movement is unique to Namibia, believed to originate in 1905, when a troop of Herero trained and uniformed by the Germans, deserted to join the Herero in the war. If legend holds, the group later drew a German troop into an ambush by calling to them in flawless German. The tradition continued as a benevolent society, still with German military traditions, training with sticks and old military band instruments. See *id.* at 483-85. The group also became active in Herero politics as a revitalization movement. See *id.* at 485-94. Thus, when the group marched and the petition was handed over to the German Embassy, it was done so by what looked like remnants of a black colonial German army troop, now in the service of the Herero nation.

⁴ *Herero Tribal Members Demand to Meet Chancellor Kohl, Seek Compensation*, BRITISH BROADCASTING CORPORATION, Sept. 18, 1995, available at http://web.lexis-nexis.com/universe/document?.m=205ba27a0d027a90c572f6e7638f33a9&_docnum=3&wchp=dGLSzS-ISlzV&_md5=0e85c932c5b337983b15bb57bb60cab4 (copy on file with the *West Virginia Law Review*).

⁵ See *Namibian Tribe Protests Against German Massacre*, *supra* note 1.

⁶ Delroy Constantine-Simms, *Hitler's Forgotten Namibian Victims*, ELECTRONIC MAIL & GUARDIAN, Sept. 26, 1997, at <http://www.mg.co.za/mg/news/97sep2/26sep-hitler.html> (last visited Oct. 12, 2001) (copy on file with the *West Virginia Law Review*).

⁷ For several different accounts of this development, see generally *infra*, note 24 and accompanying text.

⁸ *Namibian Tribe Protests Against German Massacre*, *supra* note 1. The actual claim was for \$2.2 billion (Namibian). See *id.*

⁹ *Id.*

continued, was prepared to take its case to the United Nations if Bonn rejected the claim.¹⁰ And, in a surprising move, Chief Riruako, through the Chief Hosea Kutako Foundation, recently filed a lawsuit against three German companies in the Superior Court of the District of Columbia, asking for \$2 billion (U.S.) in reparations, asserting the companies were in a “brutal alliance” with imperial Germany in the Herero War.¹¹

The Namibian government has opposed the Herero claim for reparations.¹² Heavily dependant on German aid, and dominated by the rival Ovambo tribe, the South West Africa People’s Organization (SWAPO), the ruling party, has taken the position that all Namibian tribes were victimized by colonial exploitation, and therefore, no group in particular should be singled out to receive reparation payments.¹³ But the Herero, now numbering about 125,000, and the leading opposition tribe, have persisted in pursuing their claim. It has served to define Herero identity within Namibia, setting the Herero people apart.¹⁴

In a modern Africa, with many different development regimes competing, the Herero claim deserves careful analysis. A model of “reparations” has an obvious historical root in the colonization of Africa. In addition, a pattern of violent land seizures in Zimbabwe underscores the need for effective land reform programs that, in turn, are blocked throughout southern Africa by a lack of

¹⁰ See *id.*

¹¹ Christof Maletsky, *Hereros Up the Ante in Reparations Drives*, THE NAMIBIAN, Sept. 5, 2001, <http://www.namibian.com.na/2001/September/news/0110622967.html> (last visited Oct. 12, 2001) (copy on file with the *West Virginia Law Review*). The lawsuit against Deutsche Bank, Terex Corporation, and Woermann Line (now SAF Marine) was filed in United States courts, according to Riruako, because “there will be minimal outside influence compared to if they lodged the case in Germany.” *Id.* Riruako also promised to file a similar suit, in United States District Courts, against Germany. Obviously, these lawsuits could occupy United States courts for some number of years, even considering jurisdictional issues. One early view is that these lawsuits are primarily intended for their political effect. This Article is not further concerned with these recently filed American lawsuits, but focuses on a broader question of the Herero reparations claims in their Namibian and German context.

¹² *Hereros Seek Compensation on Same Basis As Nazi Slaves*, *supra* note 2.

¹³ *Hereros Seek Compensation on Same Basis as Nazi Slaves*, *supra* note 2; Donald G. McNeil, Jr., *Its Past on Its Sleeve, Tribe Seeks Bonn’s Apology*, N.Y. TIMES, May 31, 1998, at 3, available at 1998 WL 5413415; *Reparations Not on the Table*, THE NAMIBIAN, Aug. 31, 2000, available at 2000 WL 6416303. Some might take issue with the SWAPO’s assertion that each tribe was treated equally. See, e.g., John Grobler, *The Tribe Germany Wants to Forget*, ELECTRONIC MAIL & GUARDIAN, Mar. 13, 1998, at <http://www.mg.co.za/mg/news/98mar1/13mar-herero.html> (last visited Oct. 12, 2001) (stating that “[u]nlike the politically dominant Ovambo people – who are well-represented in the ruling South West African Peoples Organisation (Swapo) – the Hereros lost most of their grazing areas . . .”) (copy on file with *West Virginia Law Review*). The Namibian government might also have its own reparations claim against Germany, but it has never chosen to assert it. Lynn Berat, *Genocide: The Namibian Case Against Germany*, 5 PACE INT’L L. REV. 165, 207-10 (1993).

¹⁴ Grobler, *supra* note 13.

funds.¹⁵ German reparations would allow the Herero, still a cattle herding people, to repurchase a substantial portion of their “stolen” lands and return their cattle to their traditional range. Ironically, under the colonial law of conquest, the Herero cannot recover nor be compensated for their “stolen” lands because the German conquest of their lands provides a legal basis for German land ownership.¹⁶ But their claim for reparations for genocide¹⁷ is based on broader rights in international and natural law and therefore may provide a better chance for success.

The Herero did not “invent” their demand for reparations. Rather, it is derived entirely from their careful reading of modern German history. Germany is making reparations to both individual Jews and the State of Israel for acts of genocide in the 1930s and 1940s, scarcely thirty years after the Herero War.¹⁸ The Herero ask an obvious question: what is the legal – or moral – distinction between German genocide directed at Jews and German genocide directed at Africans? Surely, in the modern world, a racial distinction cannot account for this difference in policy. Or is the distinction based on some meaningful difference between genocide in the Herero War and World War Two? As it was simply put by Mburumba Kerina, a Herero activist, “[T]he concerns of the Hereros must be seen in the same light as that of the Jewish people.”¹⁹

The Herero claim for reparations is directly grounded in the characterization of Germany’s history as particularly violent and as a former racist imperialist and colonial power, with a history of acknowledging this violence by paying reparations. Indeed, there is evidence that the virulent racism that promoted the holocaust not only characterized German colonization of Africa, but was

¹⁵ Andrew Meldrum, *Black Peasants Have Waited for 110 Years, Says White Minister*, THE GUARDIAN, Apr. 12, 2000, available at 2000 WL 18732122; Isabel Hilton, *Clinging to Colonialism’s Wreckage*, WKLY. MAIL & GUARDIAN, Apr. 20, 2000, <http://www.sn.apc.org/wmail/issues/000420/NEWS39.html> (last visited Oct. 12, 2001) (copy on file with the West Virginia Law Review); *Zimbabwe on Knife Edge over Farm Invasions*, AGENCE FRANCE-PRESSE, Apr. 14, 2000, available at 2000 WL 2774307.

¹⁶ SHARON KORMAN, THE RIGHT OF CONQUEST: THE ACQUISITION OF TERRITORY BY FORCE IN INTERNATIONAL LAW AND PRACTICE 5-66 (1996).

¹⁷ Genocide is a politically controversial and overused term. It may be defined as “a form of one-sided mass killing in which a state or other authority intends to destroy a group, as that group and membership in it are defined by the perpetrator.” FRANK CHALK & KURT JONASSOHN, THE HISTORY AND SOCIOLOGY OF GENOCIDE 23 (1990). A pattern of indiscriminate mass murder, then, does not define genocide. The core is a state based plan to destroy a defined group. Under this definition, most colonial wars were not genocidal because, as vicious as they were, the plan was generally to subjugate native people, not eliminate them.

¹⁸ Gabriel Schoenfeld, *Holocaust Reparations: A Growing Scandal*, COMMENT., Sept. 1, 2000, available at 2000 WL 33455762 (containing a brief history of German reparations). Since the implementation of this reparations regime, provided for by statute in 1951, Germany has paid \$55 billion (US) to both the state of Israel and four million individual Jewish victims worldwide, over a fifty year period. See *id.* The Herero demand for \$600 million is about 1% of this total amount, but much less if adjusted for inflation.

¹⁹ *Hereros Seek Compensation on Same Basis as Nazi Slaves*, *supra* note 2.

also partially formed there:²⁰ the Germans began experiments with sterilization in the name of the science of eugenics, the creation of a “master race,” in German South West Africa at the turn of the century. Herero prisoners of war were the subjects of these experiments.²¹ Similarly, Germany’s sudden and late entry into the colonial enterprise in Africa was prompted by its military victories in the Franco-Prussian War, prompting further expansion of German authority through military power.²² Consequently, the Herero seem to have a strong argument that they too deserve reparations from Germany. However, before one can completely understand the true nature of their claim for reparations, a closer look at the Herero War is necessary.

II. THE HERERO WAR: A COLONIAL WAR OF GENOCIDE

Like most colonial histories, the colonial history of Namibia is complex and still, from the standpoint of the black people who live there, largely unwritten.²³ The Herero War, an exception to this history, has been the subject of a number of books, with scholars drawn to the unique character of German colonial violence.²⁴ Although a number of meanings can be drawn from the war, the central outcome in terms of land law is clear: Germany terminated by conquest all Herero land rights in South West Africa, leaving the nation with no land at all.²⁵ Herero lands were then “sold” to settlers – ninety percent of them German – on favorable terms, with long-term loans subsidized by the government.²⁶

²⁰ A British report on German treatment of black people in South West Africa concluded that German colonialism was particularly violent and vicious, tolerating sadistic and excessive violence against natives. *See* ADMINISTRATOR’S OFFICE, WINDHOEK, REPORT ON THE NATIVES OF SOUTH WEST AFRICA AND THEIR TREATMENT BY GERMANY (1918) (copy on file with author). The report was later withdrawn and must be judged in the context of British political goals in the immediate post World War One period. However, the evidence published in the report, including numerous photographs of black people showing evidence of torture, is graphic. Obviously, the issue of the uniquely violent and racist character of German colonialism is relevant in the debate over the roots of the Holocaust.

²¹ Constantine-Simms, *supra* note 6.

²² LEWIS. H. GANN & PETER DUIGNAN, THE RULERS OF GERMAN AFRICA, 1884-1914 at 1 (1977).

²³ There is a growing body of literature in this “new” Namibian history. *See generally* HELMUT BLEY, SOUTH WEST AFRICA UNDER GERMAN RULE, 1894-1915 (1971); WOLFRAM HARTMANN, JEREMY SILVESTER & PATRICIA HAYES, THE COLONISING CAMERA: PHOTOGRAPHS IN THE MAKING OF NAMIBIAN HISTORY (1998); PATRICIA HAYES, JEREMY SILVESTER, MARION WALLACE & WOLFRAM HARTMANN, NAMIBIA UNDER SOUTH AFRICAN RULE: MOBILITY AND CONTAINMENT, 1915-1946 (1998).

²⁴ *See, e.g.*, JON BRIDGEMAN, THE REVOLT OF THE HEREROS (1981); HORST DRECHSLER, LET US DIE FIGHTING: THE STRUGGLE OF THE HERERO AND NAMA AGAINST GERMAN IMPERIALISM (1884-1915) (1980); JAN-BART GEWALD, HERERO HEROES (1999).

²⁵ WOLFGANG WERNER, NO ONE WILL BECOME RICH: ECONOMY AND SOCIETY IN THE HERERO RESERVES IN NAMIBIA, 1915-1946 at 47 (1998).

²⁶ RICHARD MOORSOM, TRANSFORMING A WASTED LAND 21-24 (1982); WERNER, *supra* note

These farms are now the heart of Namibian agriculture, occupying a wide swath from Omaruru to Gobabis and the Botswana border, the entire country to the west, north, and east of Windhoek.

This violent dispossession followed a short colonial history. The ova-Herero were traditional occupants of the high plains of central Namibia.²⁷ A Bantu tribe, the Herero had moved south into this region from Angola, via Kaokoland, in northwestern Namibia, arriving about 1750.²⁸ A series of wars with the Nama, who live to the south, occurred in the mid-nineteenth century, destabilizing the entire region.²⁹ Germany first arrived in South West Africa only in 1884, using the dubious private land claims of a German businessman, Adolf Luderitz, as the legal basis for establishing a German protectorate over a vast desert hinterland, the first German colony in Africa.³⁰ The Herero were not involved in these coastal land treaties, but on December 29, 1884, Chief Kamaherero, at Omaruru, entered into a treaty of protection with Great Britain, then engaged in a diplomatic dispute with Germany over what is now Namibia.³¹ Great Britain soon abandoned the contest, withdrawing to the Cape Colony and leaving the native people of South West Africa, with or without treaties of protection, to the Germans.³²

Kamaherero had negotiated a worthless protection agreement with the British, who were unwilling to live up to its terms.³³ Germans were everywhere in his country and Kamaherero boldly stated: "I do not want the Germans to have any of my country and never did."³⁴ It is, however, also clear that the Herero did negotiate *schutzvertrags*, treaties of protection, with Germany in Okahandja and Omaruru in October 1885.³⁵ This diplomatic history is known through colonial sources, and Herero motivation can only be surmised. At the simplest level, the presence of the Germans required some kind of Herero response, and agreeing to the treaty of protection was, on its face, a moderate accommodation. In more complex terms, Herero chiefs were (and still are)

25, at 48; Wolfe Schmoekel, *The Myth of the White Farmer: Commercial Agriculture in Namibia, 1900-1983*, 18 INT'L J. AFR. HIST. STUD. 1, 1-11 (1985).

²⁷ See WERNER, *supra* note 25, at 27.

²⁸ J.S. MALAN, PEOPLES OF NAMIBIA 68-69 (1995). See generally CARL HUGO LINSINGEN HAHN, HEINRICH VEDDER & LOUIS FOURIE, THE NATIVE TRIBES OF SOUTH WEST AFRICA 153-208 (1928).

²⁹ See *supra* note 28.

³⁰ J.H. ESTERHUYSE, SOUTH WEST AFRICA, 1880-1894: THE ESTABLISHMENT OF GERMAN AUTHORITY IN SOUTH WEST AFRICA 46-65 (1968).

³¹ *Id.* at 78-83.

³² *Id.* at 66-83.

³³ *Id.*

³⁴ *Id.* at 105.

³⁵ *Id.*

autonomous. They had a decentralized tribal government, with families and herds spread over hundreds of miles. Different chiefs may well have had different strategies to deal with German authority and the Germans were beginning to implement a "divide and rule" strategy. It is also unclear what the Herero believed these "treaties of protection" meant. Such agreements did not, on their face, cede land or sovereignty.³⁶ Rather, the Germans agreed to "protect" Herero interests from rival tribes, themselves often armed by the Germans.³⁷ Thus, the political instability of late-nineteenth century South West Africa encouraged such agreements.

In 1895, German troops intervened in Okahandja on behalf of Chief Samuel Maharero in a Herero succession dispute.³⁸ This military action cemented an alliance between the Germans and Maharero that lasted for nine years.³⁹ During this time, Maharero "sold" vast tracts of Herero lands to Germans under various kinds of arrangements, some more "legal" than others.⁴⁰ For example, German traders took vast quantities of land in exchange for trade goods, including liquor.⁴¹ They, in turn, sold the land to German farmers at huge profits.⁴² Other Herero land was empty as a rinderpest epidemic killed many of their cattle.⁴³

Some Herero lands were lost through the actions, even duplicity, of their own chiefs who "sold" the land to the Germans.⁴⁴ By 1902, the Herero only retained about 46,000 cattle of an estimated 100,000 head held ten years before.⁴⁵ In contrast, 1,051 German farmers and traders held 44,500 head.⁴⁶ The number of German settlers increased from 1,774 in 1895 to 4,640 in 1903.⁴⁷ Of 83.5 million hectares of land in the colony, 31.4 million remained in African hands⁴⁸ – although these figures include much land that belonged to Nama and

³⁶ MARK FRANK LINDLEY, *THE ACQUISITION AND GOVERNMENT OF BACKWARD TERRITORY IN INTERNATIONAL LAW* 181-206 (1926); MALCOLM SHAW, *TITLE TO TERRITORY IN AFRICA: INTERNATIONAL LEGAL ISSUES* 46-48 (1985).

³⁷ ESTERHUYSE, *supra* note 30, at 105-06.

³⁸ GEWALD, *supra* note 24, at 84-91.

³⁹ *See id.* at 91-109.

⁴⁰ *See id.*

⁴¹ *Id.*

⁴² GEWALD, *supra* note 24, at 129-36; WERNER, *supra* note 25, at 43.

⁴³ GEWALD, *supra* note 24, at 129-36.

⁴⁴ WERNER, *supra* note 25, at 44.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 43

⁴⁸ *Id.* at 43-44. These data represent cataclysmic social change: there were virtually no German farmers before the early 1890s. It took scarcely the decade of the 1890s for German

other tribes.⁴⁹ Therefore, even before the Herero War, most of their lands had been alienated.

Herero claims for reparations are, therefore, not primarily based on this loss of land, but on the genocide that followed. The most important legal base of their claim is the sweeping orders of General Lothar Von Trotha in the Herero War. In an infamous proclamation, issued on October 2, 1904, he ordered all Herero men killed and all their lands and cattle seized:

I the great General of the German troops send this letter to the Herero people. The Herero are no longer German subjects. . . . The Herero people must however leave the land. If the populace does not do this I will force them with the Groot Rohr [cannon]. Within the German borders every Herero, with or without a gun, with or without cattle, will be shot. I will no longer accept women and children, I will drive them back to their people, or I will let them be shot at. These are my words to the Herero people.⁵⁰

The next day, Herero prisoners who had been sentenced to death were hung in the presence of thirty Herero prisoners. After the hanging, the proclamation was read to the prisoners. Then, after handing out printed copies of the document in the Herero language, he drove the prisoners, including women and children, out into the Kalahari Desert.⁵¹

The major result of this pronouncement was not about "land," but about genocide. The Herero, including women and children, died after being driven out into the Kalahari and denied access to water holes. Only a relatively few casualties of the war were due to military actions; mass starvation over months killed most of the tribe. Although the war was soon over, the suffering and dying continued for several more years, as the Herero were confined to prison camps or forced to hide far out in the desert.⁵² The land that the Herero "owned" was treated indiscriminately; it was all seized by the German colonial state.⁵³ Moreover, any defects in the legal nature of the land titles sold by Maharero disappeared; there was no Herero land left anywhere in German South West

herds to grow larger than Herero herds.

⁴⁹ WERNER, *supra* note 25, at 43-44.

⁵⁰ GEWALD, *supra* note 24, at 172-73. Gewald has dismissed the view that Von Trotha's proclamation has been interpreted "out of context," concluding that the proclamation meant what it threatened, a policy of genocide. Obviously, the fact that it was printed in the Herero language and distributed to women and children who were about to be driven out into the desert (so that they could widely distribute it) demonstrates that it was carefully planned.

⁵¹ *Id.* at 173

⁵² *Id.* at 185-91.

⁵³ *Id.* at 173-91.

Africa.⁵⁴

The details of the Herero War are well known and are not in serious dispute.⁵⁵ Historian Jan-Bart Gewald constructs a convincing account that the war was used as a pretext by the Germans to annihilate the Herero⁵⁶ in order to acquire control over the remaining Herero lands.⁵⁷ At least some Herero, offended by increasing German movement on to Herero lands, and subjected to demeaning and inhuman treatment by German colonists and traders, rose in revolt. Once the revolt was under way, the Germans refused all attempts for a negotiated resolution, moving instead to a policy of genocide to sweep the Herero off their valuable lands entirely.⁵⁸ This effort was not the only German colonial war in Namibia; there was a series of such wars. The Nama, in fact, took advantage of the Herero War, attacking the Germans from the south, and carrying on a guerilla war for several years after the Herero were defeated.⁵⁹ But the Herero War was by far the most violent and the only war waged under a written policy of committing genocide.

The census of 1911 gives the Herero population in South West Africa as 15,130, down from about 80,000 before the war. A few thousand additional Herero, including Chief Samuel Maharero, had sought refuge in western Bechuanaland (now Botswana).⁶⁰ Perhaps a few hundred to a thousand more had fled

⁵⁴ *Id.* at 190-91.

⁵⁵ Like much of German history, there is a right wing "revisionist" interpretation of the Herero War that denies that genocide occurred. *Researcher into the Waterberg Tragedy of 1904 Presents a New Radical Version*, WINDHOEK OBSERVER, July 21, 2001, at 2 (summarizing an uncited University of Hamburg (Germany) masters thesis claiming that (1) fewer Herero were killed in the Herero War than modern scholars claim and (2) that these deaths were not caused by actions of the German army but by starvation). A point-by-point rebuttal was published a few weeks later. Jeremy Silvester, Werner Hillebrecht & Casper Erichsen, *Waterberg Tragedy of 1904 Triggers Hot Debate*, WINDHOEK OBSERVER, Aug. 4, 2001, at 4. See also Jeremy Silvester, Werner Hillebrecht & Casper Erichsen, *The Herero Holocaust? The Disputed History of the 1904 Genocide*, <http://www.namibweb.com/hererohol.htm> (last visited Feb. 17, 2002) (copy on file with the *West Virginia Law Review*). The major accounts of the Herero War agree on the essential details of the deaths of over 60,000 Herero people. See *supra* note 26 and accompanying text.

⁵⁶ See generally GEWALD, *supra* note 24.

⁵⁷ *Id.* at 191.

⁵⁸ For the best account of the war, see *id.* at 141-91. Previously, there were two standard accounts. See DRESCHLER, *supra* note 24; *supra* note 24. Neither account disputes that the immediate cause of the Herero uprising was the loss of their lands, but Gewald challenges the idea that it was a widely planned general revolt of the Herero people.

⁵⁹ BRIDGEMAN, *supra* note 24, at 132-63.

⁶⁰ Herero are still returning from Botswana to Namibia, with hundreds being supported under poor conditions in a refugee camp at Gam, 600 kilometers northeast of Windhoek. See Christof Maletsky, *Returned Hereros "Dumped" Says Report*, ELECTRONIC MAIL & GUARDIAN, Mar. 23, 1998, at <http://www.mg.co.za/mg/news/98mar2/23mar-herero.html> (last visited Oct. 12, 2001) (copy on file with the *West Virginia Law Review*).

to Kaokoland, a remote area beyond the police line but still in German South West Africa,⁶¹ and a few more escaped to Angola.⁶² Thus, at most 20,000 Herero survived the war, possibly no more than 17,000, leaving at least 60,000 to 63,000 dead – seventy-five to eighty percent of their pre-war population.⁶³ Within Namibia, Herero cattle were all lost and their herding culture was decimated.⁶⁴ These remaining Herero survived as refugees, living in absolute poverty in camps or near mission stations. High death rates continued in the post-war years, as the result of disease and starvation.⁶⁵ Thus, the German act of genocide against the Herero was striking and deliberate, intended both to free their lands for white settlement and also to deter similar uprisings by other Native tribes in South West Africa.

III. THE LEGAL BASIS OF THE CLAIM FOR HERERO REPARATIONS

The Herero claim for reparations began within the context of the next ninety years of colonial history. Modern Namibia looks much the way the Germans left it in 1915, when German rule suddenly ended.⁶⁶ After a brief period of British administration following the capture of South West Africa in World War One, the colony was turned over, under the provisions of a League of Nations class “c” mandate, to South African administration.⁶⁷ The British plans were for a well-ordered agricultural colonial-settler state. German farmers were left on their lands, including most of the Herero lands, the agricultural heartland, with new, often very marginal, lands to the north and south opened up to Boer settlers.⁶⁸ South West Africa became a rich agricultural land, heavily subsidized by

⁶¹ Michael Bollig, *Power and Trade in Precolonial and Early Colonial Northern Kaokoland, 1860s-1940s*, in PATRICIA HAYES, JEREMY SILVESTER, MARION WALLACE & WOLFGANG HARTMAN, *NAMIBIA UNDER SOUTH AFRICAN RULE: MOBILITY AND CONTAINMENT, 1915-1946* at 175-93 (1998) [hereinafter *NAMIBIA UNDER SOUTH AFRICAN RULE*]. It seems that a few Herero survived the war with their cattle in the safety of Kaokoland. German troops did not operate north of the police line, a line across northern Namibia delineating the boundary of white settlement.

⁶² Gesine Kruger & Dag Henrichsen, *We have Been Captives Long Enough, We Want to be Free: Land, Uniforms, and Politics in the History of the Herero in the Interwar Period*, in *NAMIBIA UNDER SOUTH AFRICAN RULE*, *supra* note 61, at 149-74.

⁶³ BRIDGEMAN, *supra* note 24, at 164 (putting the number of dead Herero at 65,000, but this may underestimate the number of people who escaped to Botswana). However, the population data of Herero in Botswana and Kaokoland are estimates. Colonial authorities, German or British, had no reason to keep accurate statistics on surviving Herero who, in any case, were hiding in very remote regions. Ironically, the 1911 census is probably accurate: German colonial authorities were compulsive record keepers. GANN & DUIGNAN, *supra* note 22.

⁶⁴ GEWALD, *supra* note 24, at 185-204.

⁶⁵ *Id.*

⁶⁶ *See id.*

⁶⁷ JOHN DUGARD, *THE NAMIBIA/SWA DISPUTE* 27-88 (1973).

⁶⁸ *Id.*

the apartheid-era South African state.⁶⁹

The Herero, who joined the British forces in the invasion of South West Africa, began a cultural renaissance under the South Africans. By all sorts of means, including large-scale squatting and various sharecropping agreements with white farmers, they regained their cattle and re-occupied vast tracts of their former lands, albeit in the more remote and undeveloped regions.⁷⁰ This history is remarkable, given the racist, and later apartheid-era policies of South Africa, but it sets the political stage for the position of the Herero in modern Namibia and for their claim for reparations.

This history is important because it structures the logic of Herero reparations. The underlying issue is the forcible deprivation of their lands which, in turn, means that there is no place to graze Herero cattle, the center of their culture.⁷¹ However, no direct reparation for land is likely because, historically, indigenous lands taken by European settler societies have rarely been returned. Although the Herero often talk about “land” in the context of reparations, the actual demand for economic reparations is based on genocide and on the merciless and systematic killing and starvation of the Herero during the 1904-07 war.⁷² This demand is grounded in the logic of reparations for Jews and other peoples victimized by the Germans before and in World War Two, analogizing the Herero War to German genocide against the Jews and not to other African and Asian colonial wars.

It would be both a futile and dishonorable discourse to venture into any kind of a comparative analysis of genocide – and such a discussion is irrelevant for purposes of the Herero position.⁷³ Genocide is genocide: murdering an African tribe cannot be rotely compared to murdering a European people, or a European nation.⁷⁴ Nothing that the Herero say in any way dismisses or diminishes the unique crimes that Germany committed against Jews. Modern international law of reparations is dominated by extensive Jewish claims for reparations against Germany and other countries,⁷⁵ but this is not the limit of reparations

⁶⁹ BRIGITTE LAU & PETER REINER, 100 YEARS OF AGRICULTURAL DEVELOPMENT IN COLONIAL NAMIBIA (1993).

⁷⁰ See DUGARD, *supra* note 67.

⁷¹ See *supra* note 28 and accompanying text.

⁷² Grobler, *supra* note 13.

⁷³ This statement is not meant to dismiss the importance of that discussion, nor of seeking a better understanding of the meaning of genocide in human actions. Rather, it is grounded in the futility of rank ordering various categories of “genocide” for various legal purposes. There is substantial literature on all aspects of genocide. CHALK & JONASSOHN, *supra* note 17.

⁷⁴ Scholarly efforts to better understand genocide by a comparative approach are few, but the comparative method does offer insight. See, e.g., Vahakn N. Dadrian, *The Historical and Legal Interconnections Between the Armenian Genocide and the Jewish Holocaust: From Impunity to Retributive Justice*, 23 YALE J. INT’L L. 503 (1998).

⁷⁵ CHRISTIAN PROSS, BELINDA COOPER & ERICH H. LOEWY, PAYING FOR THE PAST: THE STRUGGLE OVER REPARATIONS FOR SURVIVING VICTIMS OF THE NAZI TERROR (1998).

claims. Even in the context of World War Two, reparations have been paid to others, including \$1.2 billion to Americans of Japanese descent for their imprisonment and loss of their lands.⁷⁶ Also reparations have been made in a parallel settlement to Japanese Canadians,⁷⁷ and a case is pending against the Japanese for reparations for Korean “comfort women,” forced into prostitution by the Japanese army.⁷⁸ Other European claims, including that of the Romani people, raised by other peoples subjected to mass extermination in concentration camps, have failed.⁷⁹ None of these claims for reparations compare to the Jewish holocaust, but their success, nevertheless, represents important advances in human rights law.

The Herero are very aware of these legally recognized reparation claims and base their claim accordingly. Mburumba Kerina, a Herero leader, commented on the forced sexual slavery of Herero women by Germans. Comparing this to the case of the Japanese “comfort women,” Kerina explained, probably with more than a touch of irony: “Hey, that’s my grandmother – a comfort woman. . . . If the Japanese could pay for that, the Germans could.”⁸⁰ This careful attention to the existing international law of reparations distinguishes the Herero claim for reparations. The narrow discussion is a more general inquiry into the appropriateness of reparations as a political and legal remedy to the damage to various peoples caused by twentieth century colonial wars. If these situations are reasonably analogous to existing reparations claims, to dismiss them out of hand must turn on considerations that can only be called racist. If these claims are well grounded legally, then broader policy issues may be implicated and must be heard.

There is no consistent legal basis for any of the modern reparations regimes. The concept of reparations is rooted in natural law, the common law, and

⁷⁶ Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 510 (1998). See also ROGER DANIELS, SANDRA TAYLOR, & HARRY KITANO, *JAPANESE AMERICANS: FROM RELOCATION TO REDRESS* (1986); MITCHELL T. MAKI, HARRY H. KITANO & MEGAN S. BERTHOLD, *ACHIEVING THE IMPOSSIBLE DREAM: HOW JAPANESE AMERICANS OBTAINED REDRESS* (1999).

⁷⁷ ROY M. KOBAYASHI, *JUSTICE IN OUR TIME: THE JAPANESE CANADIAN REDRESS SETTLEMENT* (1994).

⁷⁸ Tong Yu, *Reparations for Former Comfort Women of World War II*, 36 HARV. INT’L L.J. 528, 528-32 (1995).

⁷⁹ Barry A. Fisher, *No Roads Lead to Rom: The Fate of the Romani People Under the Nazis and in Post-War Restitution*, 20 WHITTIER L. REV. 513, 516-20 (1999). The Roma are more commonly referred to as “gypsies,” half a million of whom were killed by Germany at the time of World War Two.

⁸⁰ McNeil, *supra* note 13, at 3. Kerena is apparently making a political point about the comparison between the Herero situation and the Japanese lawsuit: there is a legal distinction. Many “comfort women” are alive and are personally suing the Japanese government for reparations for their injuries. None of the Herero women who were forced into sexual slavery after 1905 are alive, and these particular German actions are not a basis for contemporary Herero claims.

international law; it is an equitable principle that the beneficiary of an ill-gotten gain should make restitution, both as an act of contrition and good will, but also simply to restore the victim to some part of their previous life.⁸¹ As a political matter when related to the specific context of war reparations, it is generally “winners” who demand restitution from “losers.” The original post World War Two German reparations law, Law Number 59 on Restitution of Property Stolen in the Course of the Aryanization of the Economy, was adopted by the U.S. military government and imposed on Germany in November, 1947.⁸² However, within the modern world, liberal democracies have used the language of reparations in making voluntary payments through various statutory regimes to their own indigenous or minority populations. American and Canadian payments to Japanese citizens as reparations for wartime injustice are the most extensive example,⁸³ although many payments to indigenous peoples are broadly of this type.⁸⁴ Although these Japanese reparation claims included complex litigation strategies, these ultimately failed and the final reparations settlements were political, voted by the U.S. Congress and the Canadian Parliament.⁸⁵

The Jewish claims against Germany also avoided litigation and began with ally-ordered regimes to return stolen Jewish property but proceeded to a formal claim, filed on behalf of the State of Israel, as the lawful representative of the Jewish people, with the German government.⁸⁶ A series of negotiations followed, with a final agreement resulting through political processes, and voted

⁸¹ CARL BERGMANN, *THE HISTORY OF REPARATIONS* (1927); Anthony Gifford, *The Legal Basis for a Claim of Reparations*, available at <http://www.arm.arc.co.uk/legalbasis.html> (unpublished manuscript, presented at the First Pan African Congress on Reparations, Abujua, Nigeria, Apr. 27-29, 1993) (copy on file with the *West Virginia Law Review*). While the concept appears in many places in the law, it is at the core of the doctrine of torts, the legal redress of private wrongs, as well as criminal law, the legal redress of public wrongs.

⁸² PROSS, COOPER & LOEWY, *supra* note 75, at 19. Pross, Cooper, and Loewy also have a detailed history of World War Two German reparations policy. *See id.* at 19-70. The concept of war reparations extends well back into European history, routinely negotiated as wars were concluded.

⁸³ *See supra* note 76. The United States has also paid five thousand dollars each to 2,200 Latin Americans of Japanese ancestry. Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians – A Case Study*, 40 B.C. L. REV. 275, 275 (1998).

⁸⁴ *See, e.g.*, Jennifer M.L. Chock, *One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations*, 17 U. HAW. L. REV. 463 (1995); Carter D. Frantz, *Getting Back What Was Theirs? The Reparation Mechanisms for the Land Rights Claims of the Maori and the Navajo*, 16 DICK. J. INT'L L. 489 (1998).

⁸⁵ MAKI, KITANO & BERTHOLD, *supra* note 76, at 121-36 (1999); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Barbara L. Tang, *The Japanese Internment and Reparations: Creating a Judicial or Statutory Cause of Action Against the Federal Government for Constitutional Violations*, 21 LOY. L.A. L. REV. 979 (1988).

⁸⁶ PROSS, COOPER & LOEWY, *supra* note 75, at 19-49.

on by the German Parliament. The original reparations legislation has been revised and expanded several times, with substantial opposition within Germany.⁸⁷

The legal basis of Herero reparations is rooted in both of these traditions, although it lacks support from the Namibian government. The Herero reparations claim has never been formally acted on by the German government, but it was dismissed out of hand in a speech by Roman Herzog, President of Germany.⁸⁸ In a 1998 trip to Namibia, Herzog was quoted as saying that “no international legislation existed at the time under which ethnic minorities could get reparations.”⁸⁹ Herero activist Mberumba Kerina countered by claiming that the Hague Convention of 1899 outlawed “reprisals against civilians on the losing side.”⁹⁰ In the same exchange, Herzog dismissed the idea of an apology because too much time had passed to make sense – and also fired his translator for misinterpreting his statements.⁹¹

To the extent that this exchange begins to structure the Herero case and the German response to it, several important issues emerge leaving an unclear legal basis for their reparations claim. President Herzog describes the legal basis for reparations differently than do the Herero. Herzog put his response in the language of colonialism, with his clear historical reference to the colonial domination of ethnic minorities serving as a basis for reparations as supported by no “international legislation at the time.” Thus, for Herzog, colonialism was “legal” in 1905 under international legislation, therefore ending the discussion of Herero reparations.

This analysis, however, is not the basis of the Herero claim. Rather, the Herero locate their claim in terms of the international laws of war as defined in the Second Hague Convention of 1899, a convention at which the Germans were represented and which binds the European powers as they go about their “business” of civilized warfare, that is warfare between signatory nations.⁹² Unless Germany seeks to argue, in the twenty-first century, that there was, after

⁸⁷ See *id.* See generally Frederick Honig, *The Reparations Agreement Between Israel and the General Republic of Germany*, 48 AM. J. INT’L L. 564 (1985).

⁸⁸ Grobler, *supra* note 13.

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *id.* Herzog’s statement is disingenuous. No laws existed at the time of the Holocaust that required reparations either. Rather, the weight of world opinion and changing ideas of human rights made such reparations politically necessary. The pretextual firing of the interpreter reinforces this view, German and English language education in Namibia meets a high standard.

⁹² Article 2 provides that the convention’s provisions “are only binding on the contracting powers in case of a war between them.” Hague Convention (II) with Respect to the Laws and Customs of War by Land, July 29, 1899, art. 2, available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH015.txt>. [hereinafter *Laws and Customs of War by Land*]. Therefore, the Hague Convention of 1899 did not apply to the Herero War.

1899, one set of rules for European nations conducting wars with each other and a completely different set for those same nations conducting “colonial” wars, or even more bluntly put, wars against “ethnic” peoples, it is in an untenable moral position.

The Hague Convention on the Laws and Customs of War by Land was signed on July 29, 1899 and took effect on September 4, 1900.⁹³ Intended to regulate modern warfare, the Convention contains a number of provisions that, in their plain language, were apparently violated by Germany in the Herero War. Article 4 requires that “prisoners of war in the power of the hostile government . . . must be honorably treated.”⁹⁴ Article 7 provides that “the government into whose hands prisoners of war have fallen is bound to maintain them.”⁹⁵ Article 23 states that “it is especially prohibited to kill or wound treacherously individuals belonging to the hostile nation or army; to declare that no quarter will be given; to destroy or seize the enemies property, unless such destruction or seizure be imperatively demanded by the necessity of war.”⁹⁶ Finally, Article 46 states that “family honors and rights, individual lives and private property . . . must be respected.”⁹⁷

It would follow that a systemic violation of that Convention, for example, in an order to kill all the Herero and starve their women and children, clearly a declaration that “no quarter will be given,”⁹⁸ would be legally actionable under whatever regime of international enforcement the Hague Convention recognizes, but for the fact that the Herero were not represented at the Hague, and could not, therefore, sign the convention. Thus, the issue is not the literal application of the Hague Convention to the Herero War. Rather, it is the Convention as a statement of international customary law. Importantly for the Herero, their claim can be analogized to Jewish and Japanese reparation claims, which are also not based on the Hague Convention, but on more general principles of human rights.

This leaves unanswered President Herzog’s defense: that colonialism and, apparently, colonial genocide, was legal in 1905.⁹⁹ Although his position

⁹³ See Laws and Customs of War by Land, *supra* note 92.

⁹⁴ See *id.* at art. 4.

⁹⁵ *Id.* at art. 7.

⁹⁶ *Id.* at art. 23.

⁹⁷ *Id.* at art. 46.

⁹⁸ *Id.* at art. 23.

⁹⁹ Herzog’s position is clearly the official position of the German government. It was restated in July 2001 by Dr. Helga Strachwitz, German Commissioner for African Affairs, who, when asked about “reparations for crimes against humanity committed during the German colonial period” responded that “there was no legal basis on which such payments could be made after all these years.” Crispin Inambao, *Germany Offers Namibia \$20 Million in Land Aid*, THE NAMIBIAN, July 19, 2001, <http://www.namibian.com.na/2001/july/news/013da6088.html> (last visited Oct. 21, 2001) (copy on file with the *West Virginia Law Review*).

may literally be true, that, again, is not the issue. The political and legal reasons for not opening up four hundred years of colonialism to broad claims of reparations are clear, regardless of the justice of the claims. Such a claim parallels other equally broad based claims, most prominently in the growing discussion of reparations for African slavery.¹⁰⁰ There is a substantial literature – including in law reviews – on these legal arguments.¹⁰¹ Representative John Conyers has introduced a resolution into the House of Representatives requiring the exploration of the issue of reparations for slavery in the United States.¹⁰² A Pan-African Congress on Reparations was held in Nigeria in 1993 and claims of reparations underscore some of the discourse on the rebuilding of African economies.¹⁰³ Although these efforts have most often been dismissed as politically impossible, existing legal doctrines of equity and natural law, as well as the thirteenth and fourteenth amendments of the U.S. Constitution, lend both moral and legal credibility to the case for black reparations for both slavery, primarily involving the tens of millions of overseas blacks, and for the devastation of colonialism, primarily involving blacks still living on the African continent.

However, it is important to see that the Herero claim is much more narrowly framed than the above claims are. While in the long course of human history there has clearly and unfortunately been an equally long history of genocide, the law of reparations is much more limited. Modern reparations claims, modeled after the Jewish claims against Germany, are most often very specific. The Herero are aware of this, explaining the precise basis for their claim as acts

¹⁰⁰ BORIS BITKER, *THE CASE FOR BLACK REPARATIONS* (1973); CLARENCE J. MUMFORD, *RACE AND REPARATIONS: A BLACK PERSPECTIVE FOR THE 21ST CENTURY* (1996). It is important to note that the Herero were never enslaved; the different peoples of Africa have very different colonial histories.

¹⁰¹ See, e.g., Donald Aquinas Lancaster, Jr., *The Alchemy and Legacy of the United States of America's Sanction of Slavery and Segregation: A Property Law and Equitable Remedy Analysis of African American Reparations*, 43 HOW. L.J. 171 (2000); Rhonda V. Magee, *The Master's Tools, From the Bottom Up: Responses to African-American Reparations Theory in Mainstream and Outsider Remedies Discourse*, 79 VA. L. REV. 863 (1993); Imari A. Obadele, *Reparations Now! A Suggestion Toward the Framework of a Reparations Demand and a Set of Legal Underpinnings*, 5 N.Y.L. SCH. J. HUM. RTS. 369 (1988); Irma Jacqueline Ozer, *Reparations for African Americans*, 41 HOW. L. REV. 479 (1998); Vincene Verdun, *If the Shoe Fits, Wear It: An Analysis of Reparations to African Americans*, 67 TUL. L. REV. 597 (1993); Robert Westley, *Many Billions Gone: Is it Time to Reconsider the Case for Black Reparations?*, 40 B.C. L. REV. 429 (1998).

¹⁰² Commission to Study Reparation Proposals for African-Americans Act, H.R. 3745, 101st Cong. (1989); H.R. 1684, 102d Cong. (1991). This has been re-introduced annually since its initial introduction and has always died in committee. See Ozer, *supra* note 101, at 487; Verdun, *supra* note 101, at 659-67. The Conyers bill is modeled after the Commission on Wartime Relocation and Internment of Civilians Act of 1980, Pub. L. No. 96-317, 94 Stat. 964 (codified at 50 U.S.C. § 1981 (1994)), which led to reparations payments for Japanese Americans. See Magee, *supra* note 101, at 876-80.

¹⁰³ Ricardo Rene Laremont, *Political Versus Legal Strategies for the African Slavery Movement* 1, <http://www.africa.ufl.edu/asq/v2/v2i4a3.htm> (unpublished manuscript).

of genocide committed against their nation by the German army, acting under specific orders in carrying out German colonial policy in the Herero War of 1904-07. Thus, the Herero nation is the injured party, acting on behalf of the 60,000 Herero dead in bringing the reparations claim. Although these people are clearly the grandmothers and grandfathers of every living Herero person, it is not their families who are making the claim. This formulation is deliberately designed to be broadly analogous to the successful war reparations claims resulting from German genocide in World War Two. The Herero nation is asking for reparations from roughly the same position as the State of Israel. Although, a "tribe" is not a "state," modern tribes represent their people in world forums, and nothing in the international law of reparations requires that the aggrieved people be represented by a state.

This has two equally precise legal purposes. No legal claim for reparations is likely to be entertained unless it is possible to set damages. The "costs" of colonialism and slavery over four hundred years are incalculable, and this is some barrier to these claims. But courts, in tort cases, set the price of particular human lives every day. The United States paid \$1.2 billion to twenty thousand Americans of Japanese ancestry for the loss of their property in World War Two.¹⁰⁴ The Herero have asked for \$600 million (US) – \$10,000 for each human victim; nothing for their land, nothing for their cattle. It is likely to be legally difficult, even in a culture with an elaborate oral history, to prove who among the Herero was killed, how, and where in the South West Africa of a hundred years ago. The nature of the Herero claim, as a nation, however, renders this unnecessary.

One final distinction between the Herero claim and the World War Two era claims also suggests itself: the Herero claim is at least thirty years older. Common sense suggests that there must be some time limit on reparations claims, although no law absolutely states what this might be. The Herero claim is based on a twentieth century act of genocide and grounded in similar claims arising from other twentieth century wars. Modern South Africa permits native claims for restitution of land back to the Native Land Act of 1913, a period roughly the same as the Herero claim.¹⁰⁵ Moreover, the apartheid-era policies of South Africa effectively blocked raising a reparations claim until independence in 1990, and the Herero raised their claim almost immediately thereafter. The United States and Canada, recognizing the legal difficulties Indian nations had in the nineteenth and most of the twentieth century in bringing land claims, have not limited the time frame for Native American land restitution claims, and one claim dating from 1795 is still being litigated.¹⁰⁶ For policy reasons, it makes no

¹⁰⁴ See *supra* note 74 and accompanying text.

¹⁰⁵ Restitution of Land Rights Act 22 of 1994. See also REPUBLIC OF SOUTH AFRICA, DEPARTMENT OF LAND AFFAIRS, WHITE PAPER ON LAND POLICY § 3.17 (1997); T.W. Bennett & C.H. Powell, *Aboriginal Title in South Africa Revisited*, 15 S. AFR. J. HUM. RTS. 449, 450 (1999).

¹⁰⁶ *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). This claim involves land

sense to limit reparations to genocide to the actual victims: they are most often dead, and that is precisely the nature of the evil of genocide. And, for the same reasons, it also makes no sense to require that some modern state represent the interests of a victimized people.

But, there are no formal legal rules governing the law of reparations. The Herero have posed a political claim and are still awaiting political action on the part of the German government. The claim is not justiciable in Namibian courts.¹⁰⁷ While there may ultimately be recourse to the World Court, the Herero are aware that reparations regimes operant in the world today are political and not legal.¹⁰⁸ But, these political actions have a common history of being moved by extensive legal posturing, creating a powerful moral climate supporting reparations, and shaping public opinion. This has been the main thrust of the Herero effort at the present time; the dramatic confrontation of Chancellor Kohl with the Herero chiefs and Truppenspieler attracted good press around the world.

IV. THE POLITICS OF HERERO REPARATIONS IN NAMIBIA

The current government of Namibia is strongly opposed to the demands of the Herero nation for reparations.¹⁰⁹ The underlying reasons are rooted in the politics of tribalism in the modern Namibian state. SWAPO, the ruling party, is dominated by the Ovambo tribe, who constitute about half of the population, about 700,000 people. There may be 125,000 Herero, no more than about eight percent of the population.¹¹⁰ The idea of a large reparations payment to the Herero threatens the fragile political order of Namibia. Germany, in turn, has an important relationship with the Namibian government that it is unwilling to jeopardize.

After their return to South West Africa after World War One, the Herero used a variety of subterfuges to re-occupy their lands. Herero "villages" sprang up on deserted corners of white farms.¹¹¹ Stealing cattle became an insti-

taken by the State of New York in violation of a 1795 treaty. *See id.* at 229.

¹⁰⁷ No Namibian court has been presented with any Herero reparation claims, and it is unlikely that they ever will be. This conclusion is based both on (1) an assessment of the legal doctrines in Namibia that might support a reparations claim from 1904-05 and (2) the fact that neither the German, nor the American and Canadian courts were able to apply domestic law to Jewish and Japanese reparations claims. Mary Reiko Osaka, *Japanese Americans and Central European Jews: A Comparison on Post-War Reparation Problems*, 5 HASTINGS INT'L & COMP. L. REV. 211, 226-32 (1981).

¹⁰⁸ This attitude may be changing. *See supra* notes 10-12 and accompanying text.

¹⁰⁹ *Reparations Not on the Table*, *supra* note 13.

¹¹⁰ MALAN, *supra* note 28, at 2, 4. The last Namibian census, conducted in 1991, did not, as a matter of official policy, collect data on ethnic status. Therefore, all data reported on tribal population are estimates.

¹¹¹ Kruger & Henrichsen, *supra* note 62, at 151.

tutionalized means of reparation, augmenting rapidly growing Herero herds.¹¹² Over time, even within the confines of apartheid, they became a proud and prosperous people. The Herero incorporated a number of remnants of their German heritage into their culture, including the Truppenspieler, and built close relationships with the white agricultural population.¹¹³ The creation of a number of reserves, mostly on marginal lands, later reconstituted as two Herero "homelands" on the margins of white farms, gave the Herero nation a substantial land base, where large herds could be grazed.¹¹⁴ As South Africa withdrew from Namibia, the Herero became politically active in the Democratic Turnhalle Alliance, an inter-racial political party, with a program to take Namibia to independence as an alternative to SWAPO's revolutionary armed struggle.¹¹⁵ Although many Herero fought with SWAPO, this put the Herero nation in the position of being politically opposed to SWAPO during the independence struggle.¹¹⁶ SWAPO has a long memory, viewing these Herero actions as "collaborationist."¹¹⁷

The Herero, obviously, see their political history differently. Their claim for reparations stems from their view that they occupy a special position in Namibian colonial history, having been damaged disproportionately by German colonialism. In their view, the Ovambo, and most other tribes, kept their lands and escaped German genocide. The remarkable renewal of Herero culture in the mid-twentieth century fed an isolationist Herero nationalist ideology that defined their own history as distinct from the other black nations of Namibia, with their survival of the "hellfire" of the war embodying their nation with unique moral power.¹¹⁸

Within the South African apartheid-era system, the Herero effectively utilized their "reserves," later "homelands," to rebuild their herds, and by 1940 they held 89,000 cattle, roughly the same number they held in 1895.¹¹⁹ A large and profitable dairying industry developed on the Herero reserves, and a number

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ The original Herero reserves, Aminuis, Epukiro, Eastern, Waterberg East, Otjohorongo, and Ovitoto were reconstituted as a more compact and larger Herero "homeland," consisting of Hereroland East and Hereroland West. A brief description of these reserves can be found in RUTH FIRST, *SOUTH WEST AFRICA* 142-145 (1963). The strategy of the "homelands" in Namibia was derived from the same policy in South Africa: a fiction that these black lands were "independent" homelands, designed to make South West Africa a "white" nation. A.J. CHRISTOPHER, *THE ATLAS OF APARTHEID* 182-84 (1994).

¹¹⁵ *Id.*

¹¹⁶ This is a very complicated political history. An outline of the independence process is provided in JOSEPH DIESCHO, *THE NAMIBIAN CONSTITUTION IN PERSPECTIVE* 8-35(1994).

¹¹⁷ *Id.*

¹¹⁸ GEWALD, *supra* note 24, at 284-85.

¹¹⁹ WERNER, *supra* note 25, at 187

of Herero cattle were kept on white farms, under a variety of arrangements, often illegal.¹²⁰ Herero men most often avoided becoming farm and mine laborers and remained on the reserves with their cattle.¹²¹ A Report on Native Affairs in 1939 noted:

[T]he Hereros give evidence of possessing a far stronger feeling of tribal consciousness than any of the other tribes in the Police Zone. . . . They give more evidence of being politically minded than any other tribe, and it is indeed in their tribe rather than in any other that we may expect to see in the future the expression of interests of a political character.¹²²

All the political character of Herero interests went into their claims for the restoration of their lands. In their view, the British had promised to restore these lands when they conquered South West Africa in 1915. As early as 1919 the Herero had sent a letter to Lord Buxton, the British Governor General of South West Africa:

We want a piece of land where we can live as a nation and where our families can grow into a nation We ask the Government to put us together so that we may again become a nation, we are now scattered. From the Herero-war till now we have been scattered far and wide. We have been captives long enough, we want to be free.¹²³

The British kept the land kept in the hands of the German and Boer farmers. The Herero made a number of complaints to the United Nations after 1946, invariably demanding the restoration of their lands.

The current demand for reparations is best viewed simply as the logical extension of these Herero demands for, in effect, reparations. With the creation of an independent Namibian state in 1990, Herero land claims were merged with a broad-based need for land reform, a central demand of all the liberation movements in southern Africa where the most valuable lands have long been white owned.¹²⁴ But, after 1990, Herero demands for land must be asserted against a Namibian government, not a colonial state, and must be processed

¹²⁰ *Id.*

¹²¹ WERNER, *supra* note 25, at 191-216.

¹²² LORD HAILEY, REPORT ON NATIVE AFFAIRS IN SWA 128 (1939).

¹²³ Kruger & Henrichsen, *supra* note 62, at 152 (quoting "Herero Adresse" in F. Rudolf Lehman, "Geschichte der 'Truppspieler' undter den Herero in Sudwestafrika," 38-39 (unpublished manuscript)).

¹²⁴ UNITED NATIONS INSTITUTE FOR NAMIBIA: NAMIBIA: PERSPECTIVES FOR NATIONAL RECONSTRUCTION AND DEVELOPMENT 106-149 (1986).

along with all of the other demands for land raised by all of the indigenous tribes. The remarkable record of the Herero in rebuilding their cattle culture in Hereroland does not support their claims against other Namibian tribes, each with their own distinct history of colonial oppression. This is particularly true of the Ovambo, who not only govern Namibia, but also occupy an overcrowded and overgrazed land in the far north.

SWAPO, rooted in the Ovambo, as the current Namibian government, has also played a mean and petty politics of domination against other Namibian peoples. The Himba, another Herero tribe, have been shabbily treated in the context of a proposed hydro-power scheme.¹²⁵ The Basters have lost many of their land rights in a long-standing dispute with the government. The Fwe in Caprivi raised a small insurrection in 1999.¹²⁶ One hundred Herero traditional leaders, including Paramount Chief Riruako, marched on the Namibian government in 1998 to protest the lack of legal recognition of their status.¹²⁷ All of this demonstrates a complex pattern of Ovambo domination over smaller tribes – and all tribes in Namibia are much smaller than the Ovambo.

Thus, a Herero demand for reparations may well be more effective internationally than a demand for land within Namibia, particularly when all internal “land reform” measures have been stalled since independence.¹²⁸ The goal of reparations, however, is largely (but not entirely) to buy land, coming back full circle to the Herero demand for the return of their “stolen lands”, the lands lost to the German colonizers both before and after the Herero War. Not only does the claim for reparations represent perhaps their best chance to get back some of their lands, but it also continues to build Herero political consciousness. The unique nature of their claim for reparations is based on their particular history in Namibia, their heroic war against German imperialism. This, in turn, sets the Herero apart from other Namibian tribes – which is precisely their political

¹²⁵ Sidney L. Harring, *God Gave Us This Land: The OvaHimba, the Proposed Epupa Dam, the Independent Namibian State, and Law and Development in Africa*, 15 GEO. INT'L ENVTL. L. REV. 35 (2001).

¹²⁶ *All Hell Breaks Loose in Caprivi*, THE NAMIBIAN, Sept. 4, 1999, at <http://www.namibian.com.na/Focus/caprivi/hell.htm> (last visited Feb. 18, 2002). What occurred on August 2, 1999 is not entirely clear and there is some evidence that the government of Namibia has exaggerated the nature of the “insurrection.” MARIA FISCH, THE SECESSIONIST MOVEMENT IN THE CAPRIVI: A HISTORICAL PERSPECTIVE (1999). Mishake Muyongo, the Fwe leader, was a former SWAPO party official, currently serving as a DTA member of Parliament, abandoning his seat when he fled for exile in Denmark. Hundreds of other Fwe and Bushmen remain in Botswana. Obviously, in a small country, holding hundreds of people in prison facing treason charges has an impact on the political culture: the government intends to vigorously punish the rebellious Fwe to make a point with other minority groups.

¹²⁷ *Herero Chiefs March on Government*, ELECTRONIC MAIL & GUARDIAN, Apr. 24, 1998, at <http://www.mg.co.za/mg/news/98apr/24apr-namibia.html> (last visited Oct. 12, 2001) (copy on file with the *West Virginia Law Review*). Under the Traditional Authorities Act, traditional chiefs have local governmental powers and are paid a salary by the Namibian state.

¹²⁸ DONNA PANKHURST, A RESOLVABLE CONFLICT: THE POLITICS OF LAND IN NAMIBIA 102-129 (1996).

objective.

This has some significant internal consequences in Namibia. At the outset, it enrages many non-Herero, especially the Ovambo, who have their own history forged by another war, the war for independence. This serves to isolate the Herero internally. In addition, because the Government of Namibia opposes Herero reparations, this opposition is likely to undermine the possibility of the Herero ever collecting any reparations from Germany. The German government itself has taken this as the core of its policy, announcing that "the issue of reparations would not be considered . . . as Namibia was already receiving preferential financial support from Germany," – DM 1 billion since independence.¹²⁹

This isolation, however, also builds a tribal political consciousness. Effective strategies of confronting this kind of political adversity have kept the Herero powerful and economically well-off since the 1920s. This consciousness, we cannot forget, was built during South African-era rule. In this context, political or economic confrontation with SWAPO and the Ovambo does not daunt Herero leaders. Maintaining tribal cohesion in a modernizing world is an extremely difficult problem for tribal peoples everywhere. Herero politics manages to meet this challenge very effectively.¹³⁰ Without their claim for reparations, the Herero are simply one relatively small tribe occupying a dusty and overgrazed corner of southern Africa. With the claim, the Herero may one day sit and negotiate with Germany.

V. CONCLUSION

The Herero claim for reparations against Germany for genocide in the Herero War deserves to be heard. At its most basic level, it factually represents one of the best cases possible for opening the question of reparations for colonial oppression against the various imperial powers. The direct founding of this claim in the specific context of Germany's responsibility for reparations for Jewish victims of World War Two era genocide directly raises the question: how is colonial era genocide different from modern European genocide? In an impoverished Africa, it cannot be surprising that the indigenous people there cannot accept the legitimacy of two regimes of international law, one for Euro-

¹²⁹ *Reparations Not on the Table*, *supra* note 13. (quoting Hans Buttner, Spokesperson for the Southern African Development Community in the German Parliament). Buttner also claimed that Germany has already contributed (DM) 1 billion in development aid to Namibia, as well as contributing 30% of the European Economic Community aid and that "the best way to assist Namibians is through development aid." *See id.*

¹³⁰ Absalom Shigwedha, *Namibia Row over Circumcision Torture*, ELECTRONIC MAIL & GUARDIAN, Feb. 14, 1997, at <http://www.mg.co.za/mg/news/97feb1/14feb-namcircumcision.html> (last visited Oct. 12, 2001) (copy on file with the *West Virginia Law Review*) reports a number of Namibian authorities condemning the public circumcision of an eleven year old boy at the house of Herero paramount chief Kuaimi Riruako. The Herero proudly held the event in front of a BBC film crew, celebrating it as a part of their traditional culture.

peans, another for Africans. Because the Herero claim is narrow based on a particular – and well-documented – act of twentieth century genocide, in a particular colonial war, against a nation with a record of recidivism at genocide, it is an appropriate case for a reparations claim against Germany.

To proceed on this basis says no more about the possibility of similar claims from other indigenous tribes massacred in twentieth century colonial wars than the American recognition of the Japanese American claim for reparations reaches the dozens of other peoples dislocated by World War Two. There is no clearly recognized regime in international law for reparations. This is an emerging area of international human rights law, best approached on a case by case basis. This is not to say that the Herero claim does not present significant problems and challenges in international and human rights law.

A central need in Namibia, and more broadly in southern Africa, is the need for land reform. Black people only live as menial laborers on the farms of central Namibia. The Namibian government has been unable to deliver on its promise of land reform just as the Zimbabwean government has failed to deliver. There are a number of reasons for this failure, including a lack of funds to purchase white owned farms followed by the lack of education and experience of blacks to make a success at the business of commercial agriculture.

A metaphorical exercise in Africa is “turning back the clock”, imagining a prosperous black Africa. One place where this can happen is in central Namibia; Herero herdsmen can simply move their cattle to the existing white farms and take over. There is no inherent reason why blacks cannot graze cattle on large farms; it takes good water, good grass, and some experience with animal husbandry – all of which the Herero have. Thus, one small experiment with land reform is ready to move forward – and likely would if Germany paid the Herero \$600 million (US) – roughly the price of 1000 of the 4000 white-owned commercial farms in Namibia.¹³¹ About one-fourth of the land reform in Namibia could be financed through this reparations policy. Obviously, the clock can never be turned back in Africa. But, the Herero, one tribe, could go back to their herds and make a living for themselves and their families, pay taxes to support further land reform in Namibia, and set one small example of what a “new,” decolonized Africa might look like. Such a policy inherently supports the existing Herero social and political order, which has many of the problems of other African tribes. But, it is not possible to base redevelopment in Africa on western social and political models.

This would not accomplish land reform in the rest of Namibia – and that surely is a problem that will need to be dealt with. Continued inequality in Namibia raises difficult political questions, but regimes of land reform, on an im-

¹³¹ See generally FIONA ADAMS, WOLFGANG WERNER & PETER VALE, *THE LAND ISSUE IN NAMIBIA: AN INQUIRY* (Namibia Institute for Social and Economic Research, University of Namibia, Windhoek, 1990) (copy on file with author). Sidney L. Harring, “The Stolen Lands” Under the Constitution of Namibia: Land Reform under the Rule of Law (copy on file with the *West Virginia Law Review*) (unpublished paper presented at “Ten Years of Namibian Nationhood” on Sept. 12, 2000).

poverished continent, cannot be rooted in the continued poverty of those receiving land. Land reform must move forward, and the Herero development of about 1000 farms – the core of the former Herero lands -- still leaves three quarters of the land reform in Namibia, 3000 farms, for other tribes, using other economic and political programs. Each African tribe is different, with its own culture and its own needs for development. The Herero might even be asked to use part of their reparations to support other indigenous agricultural development schemes in central Namibia. Damaraland, Namaland, and Ovamboland are impoverished communal lands, without the potential for agricultural development that central Namibia enjoys. No single model of land reform is likely to be successful.

Any “reparations” model is not a perfect model upon which to base land reform and economic development. It is inherently unequal, rooted in historical wrong, and of benefit to a select group of recipients, the descendents of victims of that wrong. These people are entitled to “reparations” not because they are inherently more worthy than other people living in the world, but because of their identity in relationship to some group. This is simply the way a reparations model works. Herero reparations are not a perfect model for economic development in Namibia – but that is not the standard on which the legal concept of reparations is judged. The purpose of such reparations is not simply to make the victims “whole” again, for that is never possible. Rather, it is to set a model of international human rights by forcing nations that commit genocide to acknowledge their responsibility and pay reparations. The Herero, as are any people victimized by genocide, are entitled to bring their claim for reparations forward. Germany should consider it in the same legal framework that it has considered reparations claims of other peoples victimized by German genocide. The international community, and the various international human rights organizations, should insist on it.

No single model for reconstruction, land reform, and social development will work for every people in Africa. The process of colonialism engaged each people in a historically specific way. The tribe is a powerful political and cultural force, with great potential to work constructively in modern Africa. “Tribalism,” a culture of advancing tribal interests through conflict, also runs great risks, and is capable of great harm, including, all too often, new incidents of genocide in post-colonial Africa.¹³² But the concept of reparations is designed

¹³² Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221 (2000); Dora Lee Peacock, *It Happened and It Can Happen Again, The International Response to Genocide in Rwanda*, 22 N.C. J. INT’L L. & COM. REG. 899 (1997); Panel Discussion, *Fifty Years of the U.N. Genocide Convention: What Does it Mean for Africa*, 26 SYRACUSE J. INT’L L. & COM. 173, (1999). The mass murder of Tutsi by rival Hutu in Rwanda is only the best known of many incidents of tribal acts of genocide in post-colonial Africa. Human Rights Watch between 1997 and 2000 published reports on mass killings based on tribal identity in the Democratic Republic of Congo, Nigeria, Burundi, Sierra Leone, Rwanda, and Sudan. See Human Rights Watch Report, *Eastern Congo Ravaged: Killing Civilians and Silencing Protest*, available at <http://www.hrw.org/reports/2000/drc/Drc005.htm> (last visited Feb. 25, 2002); Human Rights Watch Report, *Democratic Republic of Congo: Casualties of War*, available at <http://www.hrw.org/reports/1999/congo> (last visited Feb. 25, 2002);

to hold those responsible for genocide accountable and to advance a culture of human rights, not to unfairly benefit a small group of beneficiaries. The Herero are working within a democratic framework in modern Namibia, pursuing their goals openly, non-violently, and consistent with broad principles of international law. There is no reason to deny, out of hand, their demand for reparations because it advances the interests of one particular tribe. If other African nations or peoples wish to bring forward other claims for reparations, against Germany or any other country, there is no reason not to move these through whatever political and legal processes exist for resolving such claims. This process, indeed, is how international law develops, growing and changing to meet new needs.

Each people in the world has a right to at least argue its own definition of its history in relationship to both other peoples of the world, and also in relationship to major events and trends in world history. For all the diversity of experiences of the many nations and tribes of Africa, not much of this kind of history has been brought forward. The Herero, in bringing forward their reparations claim, have done so both as a statement of their place in modern Namibia and in the world. The German Reichstag, sitting in Berlin, the Prussian capital, can debate the political question of why reparations is the policy for Germany's World War Two era genocide, but not its African genocide of thirty years earlier. And it may one day have to do this as Herero Truppienspieler march up Unter den Linden, gather at the Brandenburg Gate, and their chiefs denounce German colonialism in good Namibian German. Reparations claims are never heard outside of their political context, and the Herero people will have to bring political pressure on modern Germany to rethink their responsibility for their actions in the Herero War.

Finally, in a world with recurring examples of genocide often (but obviously not always) occurring in the context of small, third world wars, it is important to learn whatever lessons can be learned from the history of these wars and from the efforts of the aggrieved populations to seek reparations. As difficult as the legal issues of reparations are from these wars, it is far better for the world to know about these events and to discuss and study them than to bury this history, forgetting that these wars, like the Herero War, ever happened.

Human Rights Watch Report, *Democratic Republic of the Congo: What Kabila is Hiding: Civilian Killings and Impunity in Congo*, available at <http://www.hrw.org/reports97/congo> (last visited Feb. 25, 2002); Human Rights Watch Report, *Nigeria: Crackdown in the Niger Delta*, available at <http://www.hrw.org/reports/1999/nigeria2> (last visited Feb. 25, 2002); Human Rights Watch Report, *Burundi: Neglecting Justice in Making Peace*, available at <http://www.hrw.org/reports/2000/burundi> (last visited Feb. 25, 2002); Human Rights Watch Report, *Sierra Leone: Getting Away with Murder, Mutilation, Rape*, available at <http://www.hrw.org/reports/1999/sierra> (last visited Feb. 25, 2002); Human Rights Watch Report, *Sierra Leone: Sowing Terror: Atrocities Against Civilians in Sierra Leone*, available at <http://www.hrw.org/reports98/sierra/> (1998); Human Rights Watch Report, *Leave None to Tell the Story: Genocide in Rwanda*, available at <http://www.hrw.org/reports/1999/rwanda> (last visited Feb. 25, 2002); Human Rights Watch Report, *Sudan: Global Trade, Local Impact: Arms Transfers to All Sides in the Civil War in Sudan*, available at <http://www.hrw.org/reports98/sudan> (last visited Feb. 25, 2002).

